

CHAPTER 12

THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS

WHAT ARE THE BASIC PRINCIPLES AND OBJECTIVES OF THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY AND SMALL BUSINESS?

1. Plan for and create a more diverse work force.
2. Maintain, update, establish goals, and report on Diversity Plan, Equal Employment Opportunity, and Subcontracting Plan.
3. Identify Energy Policy Act related requirements and make awards to targeted groups.

WHY IS THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS IMPORTANT?

Department of Energy (DOE) policy recognizes that full utilization of the talents and capabilities of a diverse work force is critical to the achievement of its mission. The principal goals of this policy are to:

- Develop innovative strategies to increase opportunities; and
- Foster and enhance partnerships with small, small disadvantaged, and women-owned small businesses; and minority educational institutions.

This includes minority educational institutions which are Historically Black Colleges and Universities, Hispanic serving educational initiatives, and Native American Institutions.

What does this chapter cover?

This Chapter addresses:

- Diversity Planning in the contractor's workforce;
- Equal Employment Opportunity and Affirmative Action activities, roles, and relationships of the prime contractor, its subcontractors, and the DOE; and
- The contractor's interrelationship with Small Businesses.

What is the goal of the Diversity Plan?

The objective of the Diversity Plan, as implemented by the Department of Energy Acquisition Regulation (DEAR) 970.5204-81, "Diversity Plan" clause and the

requirement for a “total package” Diversity Plan, is to obtain the contractor’s commitment to diversity sensitivity and inclusiveness in all aspects of its business practices, the workplace, and relations with the community at large.

DOE contractors have the opportunity to be innovative with Diversity Plans; to plan and invoke strategies under Government awards to increase opportunities for:

- Minorities,
- Women,
- Veterans,
- American Indians,
- Hispanics, and
- Other groups of workers,

who have not had the chance to fully use their talents.

What is the Affirmative Action Program?

Affirmative Action is defined as a contractor’s program which complies with Department of Labor regulations to ensure Equal Employment Opportunity for minorities, women, persons with disabilities, and veterans. Executive Order (EO) 11246, “Equal Employment Opportunity,” as amended by EO 11375, provides Equal Employment Opportunity and Affirmative Action guidelines for Federal contractors regarding race, color, gender, religion, and national origin. The EOs prohibit Federal contractors and Federally-assisted

construction contractors and subcontractors, who do over \$10,000 in Government business in one year, from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. The EOs also require Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Thus, a contractor’s Plan refers to a contractor’s program that complies with Department of Labor regulations to ensure equal opportunity in employment.

What are the objectives of the Department’s Small Business, HUBZone Small Business, Small Disadvantaged Business, and Women-Owned Small Business Programs?

It is the policy of the government to provide maximum practicable opportunities in its acquisitions to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns shall also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. (Federal Acquisition Regulation (FAR) 19.201)

DOE’s prime management contracts exceed \$500,000 making it a requirement that an acceptable Subcontracting Plan be submitted, incorporated into, and made a material part of the contract. (FAR 19.705-5(a)(5) and 19.702(a)(1)). The Subcontracting Plan must establish socio-economic objectives for small business, HUBZone small business, small

disadvantaged business, and women-owned small business concerns as subcontractors.

Section 221 of Public Law 95-507 requires that the heads of Federal agencies, after consultation with the Small Business Administration (SBA), establish contract goals for small and small disadvantaged businesses. EO 132138 requires goals for prime contracts to women-owned firms. As provided in Office of Procurement Policy Letter 99-1, the government-wide small business goal is not less than 23 percent of the total value of all prime contracts awarded for the fiscal year.

The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) established a five percent government-wide goal for contract awards to woman-owned small businesses. DOE is one of eleven agencies identified by the SBA to participate in the Woman-Owned Small Business Procurement Pilot Program. The Program was established to enhance outreach, training and marketing assistance to woman-owned small businesses.

Where can I go for more information on these programs?

Further information may be obtained from the Office of Economic Diversity home page which is also listed in Appendix B:

<http://www.hr.doe.gov/ed/index.html>

Additionally, you may access the OFPP Policy Letter mentioned above and other similar documents at the following web page which is also listed :

<http://www.arnet.gov/Library/OFPP/PolicyLetters/>

What is the role of the Contracting Officer under these programs?

The Administrative Contracting Officer (ACO) (usually the Contracting Officer (CO) at DOE) is responsible at FAR 19.706 for assisting in evaluating Subcontracting Plans, and for monitoring, evaluating, and documenting contractor performance under the clause at FAR 52.219-9, "Small Business Subcontracting Plan," and the Subcontracting Plan included in the contract.

WHAT IS A GENERAL DESCRIPTION OF THE PROCESSES UNDER THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY AND SMALL BUSINESS?

A. The Diversity Plan

As an important element of contract reform, the Department requires that its contractors take appropriate action to develop a comprehensive and integrated approach to managing diversity across their business operations. This requirement is implemented through the inclusion of a diversity contract clause in major facilities management contracts. The clause requiring

submission of a Diversity Plan is necessary to implement DOE's diversity policy.

The information in the Diversity Plan, which is submitted per DEAR 970.5204-81 initially to the CO for approval within 90 days after the effective date of the contract and updated annually thereafter, is used by DOE Contracting Officer's (COs) to evaluate contractor performance. It is also used to determine whether DOE's policy of developing innovative strategies to increase opportunities for small, minority, women-owned businesses, and educational institutions is being advanced. Compliance with and performance against the Plan will be assessed as part of the contractor's annual performance report card. The CO provides a copy of the Plan to their Office of Small and Disadvantaged Business Utilization and includes the Plan in the official contract file as required by Acquisition Letter 98-04.

DEAR 970.5204-81 requires the Plan to include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan also addresses, at a minimum, the Contractor's approach for promoting diversity through:

- The Contractor's work force,
- Educational outreach,
- Community involvement and outreach,
- Subcontracting, and
- Economic development including technology transfer.

In accordance with the clause, the contractor must submit an update to its Plan with its annual fee proposal in accordance with guidance that is provided in an Appendix to the contract. Guidance on what the Department was seeking in that appendix and in the Diversity Plans was published in the Federal Register (62 FR 44350) on August 20, 1997. This guidance was presented for informational purposes to help contractors understand what the Diversity Plan was intended to address. The guidance on what may be included in a Diversity Plan also appears in Acquisition Letter 98-04.

Every Diversity Plan must be tailored to the circumstance of the individual contract and site. The contractor's Diversity Plan need not repeat information addressed elsewhere in the contract or the contractor's proposal. The Plan should identify the document containing the information.

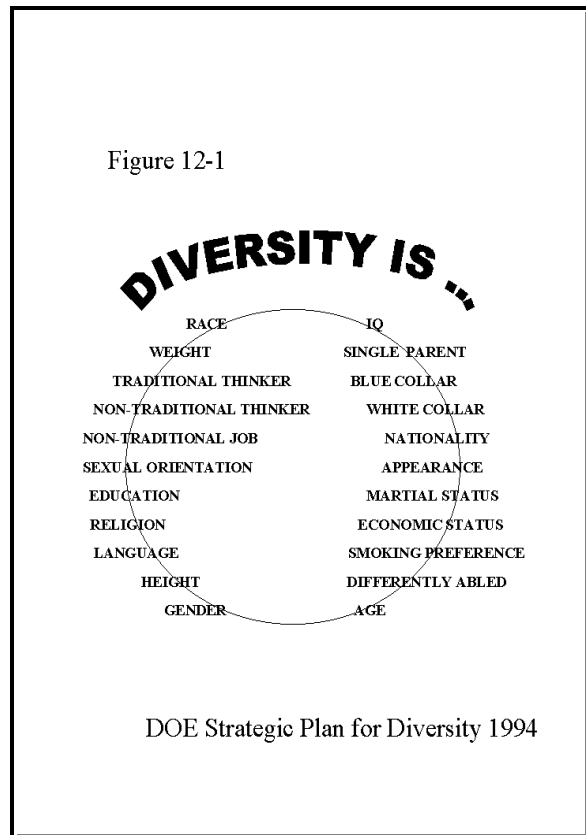
The model organizational culture at DOE that fosters diversity is shown in Figure 12-1.

B. Equal Employment and Affirmative Action

General

The U.S. Department of Labor's Office of Federal Contract Compliance Programs has been committed, since 1965, to ensuring that Government contractors comply with Equal Employment Opportunity and the affirmative action provisions of their contracts. Also, that office administers and enforces EO 11246, as amended.

Figure 12-1



cooperating with and assisting the Office of Federal Contract Compliance Programs in fulfilling its responsibilities.

Additionally, FAR 22.802 states the CO will approve no contract, modification, or subcontract with a person found ineligible by the Deputy Assistant Secretary for Federal Contract Compliance, U. S. Department of Labor, for reasons of noncompliance with the requirements of EO 11246. COs and contractors are not to contract for supplies or services in a manner so as to avoid applicability of the EO 11246 requirements. All contractor disputes related to compliance are handled according to the rules, regulations, and relevant orders of the Secretary of Labor.

All or part of the requirements of EO 11246 may be excluded from a contract for very limited reasons articulated at FAR 22.807(a). Some exemptions apply even through a contract or subcontract contains the Equal Opportunity clause. The nuances of these exemptions are at FAR 22.807(b) and fall into categories such as:

- Transactions of \$10,000 or less,
- Work outside the United States,
- Contracts with state or local governments,
- Work on or near Indian reservations,
- Facilities not connected with contracts, and
- Indefinite-quantity contracts where the CO has reason to believe the amount

EO 11246, as amended, sets forth the Equal Opportunity Clause (which can be found at

FAR 52.222-26) and requires that all agencies include the clause in all nonexempt contracts and subcontracts (exemptions listed below). The EO also requires that all agencies act to ensure compliance with the clause. It also requires compliance with the regulations of the Secretary of Labor to promote the full realization of equal opportunity for all persons, regardless of race, color, religion, sex, or national origin.

FAR 22.803 states the head of each agency is responsible for ensuring that the requirements are carried out within the agency. They are also responsible for

ordered in any year under the contract will not exceed \$10,000.

reasonably be expected to total, \$50,000 or more;

What does an Affirmative Action Program do?

A written Plan helps the contractor identify and analyze participation and utilization of women and minorities in the contractor's workforce. If there are problems, the contractor will specify in its Affirmative Action Program the specific procedures it will follow and the good faith efforts it will make to provide equal employment opportunity. Expanded efforts in outreach, recruitment, training, and other areas are some of the affirmative steps contractors can take to help members of the protected group compete for jobs on equal footing with other applicants and employees.

Affirmative action is not preferential treatment. It does not mean that unqualified persons should be hired or promoted over other people. What affirmative action does mean is that positive steps must be taken to ensure Equal Employment Opportunity for traditionally disadvantaged groups.

When are non construction - Affirmative Action Programs developed?

Unless exempt, each non-construction prime contractor and each subcontractor with 50 or more employees, and:

- Either a contract or subcontract of \$50,000 or more; or
- Government bills of lading that in any 12-month period total, or can

is required at FAR 22.804-1 to develop a written affirmative action program for each of its establishments.

Each contractor and subcontractor must develop its written affirmative action program within 120 days from the commencement of its first such Government contract, subcontract, or Government bill of lading.

How do construction - Affirmative Action Programs apply?

Construction contractors that hold a nonexempt Government construction contract are required to meet:

- The contract terms and conditions citing affirmative action requirements applicable to covered geographical areas or projects; and
- Applicable requirements of 41 Code of Federal Regulations (CFR) 60-1 and 60-4.

Each agency maintains a listing of covered geographical areas subject to affirmative action requirements. That listing specifies goals for minorities and women in covered construction trades. Information concerning, and additions to, this listing will be provided to the principally affected COs in accordance with agency procedures. Any CO contemplating a construction project in excess of \$10,000 within a geographic area not known to be covered by specific affirmative action goals shall request

instructions on the most current information from the Office of Federal Contract Compliance Programs regional office.

COs give written notice to the Office of Federal Contract Compliance Programs regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. This is in accordance with FAR 22.804-2(c). When requested by the Office of Federal Contract Compliance Programs regional office, the CO arranges a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

What does Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era mean?

The clause at FAR 52.222-35, "Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era," is used in solicitations and contracts expected to be \$10,000 or more. The exception is when the work is performed outside the United States by employees recruited outside the United States or when the agency head has waived the terms of the clause. When the clause at FAR 52.222-35 is contained in a contract or solicitation, the clause at FAR 52.222-37, "Employment Reports on Disabled Veterans and Veterans of the Vietnam Era," is also used.

CO responsibilities with respect to waivers, furnishing of prescribed notices for posting, notices to unions with respect to collective bargaining agreements, forwarding of complaints and actions with respect to sanctions imposed by the Department of

Labor, are covered under FAR 22.1303 through FAR 22.1307.

The clauses at FAR 52.222-35 and 52.222-37 describe the responsibilities of the Contractor with respect to disabled veterans and veterans of the Vietnam Era. This includes:

- Affirmative action to employ, advance in employment, and otherwise treat qualified disabled veterans without discrimination based on their disability or veteran's status;
- List employment openings, except for executive and top management positions, positions to be filled from within the contractor's organization, and positions lasting 3 days or less, with the appropriate employment service office; and
- Contractors subject to FAR 52.222-35 are required to submit Standard Form VETS-100 – Federal Contractor Veterans' Employment Report, at least annually to the Secretary of Labor, regarding employment of Vietnam era and disabled veterans.

What is Affirmative Action for Workers with Disabilities?

The clause at FAR 52.222-36, "Affirmative Action for Workers with Disabilities," is used in solicitations and contracts when the contract is, or is expected to be, \$10,000 or more. The exception is when the work is to be performed outside the United States by employees recruited outside the United States or when the agency head has waived the terms of the clause.

Under FAR 22.1403 through FAR 22.1407, CO responsibilities are covered with respect to:

- Waivers,
- Furnishing of prescribed notices for posting,
- Notices to unions with respect to collective bargaining agreements,
- Forwarding of complaints, and
- Actions with respect to sanctions imposed by the Department of Labor.

The clause at FAR 52.222-36 describes the specific responsibilities of the Contractor with respect to affirmative action for workers with disabilities. Generally, Contractors are required to take affirmative action to employ, and advance in employment, qualified individuals with disabilities, without discrimination based on their physical or mental disability.

How is “Visa Denial” handled?

The clause at FAR 52.222-29, “Notification of Visa Denial,” is used in contracts that include the clause at FAR 52.222-26, “Equal Opportunity,” if performance is required in or on behalf of a foreign country. The clause states it is a violation of EO 11246, as amended, for a contractor to refuse to employ any applicant or not to assign any person hired in the United States, on the basis that the individual’s race, color, religion, sex, or national origin is not compatible with the policies of the country

where the work is to be performed or for whom the work will be performed. The clause requires notifications by the contractor when it has knowledge of any employee or potential employee being denied an entry visa to a country in which the contractor is required to perform the contract, and it believes that the denial is because of race, color, religion, sex, or national origin.

What is “Prohibition of Segregated Facilities?”

The clause at FAR 52.222-21, “Prohibition of Segregated Facilities,” is used in contracts and subcontracts that include the clause at FAR 52.222-26, “Equal Opportunity.” Contractors or subcontractors must agree that they do not and will not maintain or provide any segregated facilities at any of its establishments. They must also agree that they do not and will not permit their employees to perform their services at any location under their control where there are segregated facilities.

What is “Non Discrimination Because of Age?”

Contractors and subcontractors, in connection with employment, advancement, or discharge of employees, are not to discriminate against persons because of their age. Maximum age limits for employment may not be specified in solicitations or advertisements for employees to work on Government contracts. The exception is when the age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement. There are no

special contract clauses with respect to this restriction.

What are the procedures for “Pre-Award Clearances?”

Pre-award Equal Employment Opportunity clearances for contracts and subcontracts of \$10,000,000 or more (excluding construction) are required from the appropriate Office of Federal Contract Compliance Programs regional office before award of a contract (including any indefinite delivery contract or letter contract). Clearance is also required for modification of an existing contract for new effort that would constitute a contract award.

Pre-award clearance for each proposed contract and for each proposed first-tier subcontract of \$10 million or more are requested by the CO directly from the Office of Federal Contract Compliance Programs regional office(s). Verbal requests are confirmed by letter or facsimile transmission. For work performed outside the United States with employees recruited within the United States the pre-award clearance is sent to the Office of Federal Contract Compliance Programs (OFCCP) regional office as specified in FAR 22.805(a)(3).

Pre-award clearance need not be requested if:

- The proposed contractor is listed in the OFCCP National Pre-award Registry via the web site listed in Appendix B.
- The projected award date is within 24 months of the proposed contractor's

Notice of Compliance completion date in the Registry; and

- The CO documents the Registry review in the contract file.

Information included in the pre-award clearance request is listed at FAR 22.805(a)(5). Pre-award clearances are requested at least 30 days before the proposed award date. Guidance regarding when pre-award clearance can be presumed to have been received from Office of Federal Contract Compliance Programs and guidelines for awards without preaward clearance can be found at FAR 22.805(a)(7)&(8).

COs furnish the contractor with appropriate quantities of the poster entitled “Equal Employment Opportunity Is The Law”.

What are contractor Equal Opportunity requirements?

The Equal Employment Opportunity clause at FAR 52.222-26 generally requires that the contractor take the following actions with respect to Equal Employment Opportunity:

- Not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. However, a preference to employ Indians living on or near an Indian reservation, in connection with employment opportunities on or near an Indian reservation, is not a violation if the intention is publicly announced.
- Take affirmative action to ensure that applicants are employed, and that

employees are treated during employment, without regard to their race, color, religion, sex, or national origin. These shall include, but not be limited to employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

- Post the poster entitled “Equal Employment Opportunity Is The Law” in conspicuous places available to employees and employment applicants.
- State in all advertisements for employees that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.
- Send to each labor union or representative of workers with which it has a collective bargaining agreement the Notice of the Contractor’s commitments under the clause and to post copies of the notice in conspicuous places.
- Comply with EO 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.
- Furnish to the contracting agency all information required by EO 11246, as amended, and by the rules, regulations and orders of the Secretary of Labor.

- File Standard Form 100 (EEO-1). Filing must be done within 12 months preceding the date of contract award or within 30 days after contract award.
- Permit access to its premises during normal business hours to the contracting agency or the Office of Federal Contract Compliance Programs for the purpose of conducting on-site compliance evaluations and complaint investigations. The contractor shall permit the inspection and copying of any pertinent material relevant to any matter under investigation.
- Include the terms and conditions of subparagraphs (b)(1) through (b)(11) of the clause at FAR 52.222-26 in every nonexempt subcontract and purchase order.
- Take such action with respect to any subcontract or purchase order as the CO may direct as a means of enforcing these terms and conditions.

What are the Affirmative Action compliance requirements for construction?

These requirements are set forth in the clause found at FAR 52.222-27, “Affirmative Action Compliance Requirements for Construction.” If the Contractor, or a subcontractor at any tier, subcontracts a portion of the work involving any construction trade, each such subcontract in excess of \$10,000 shall include this clause. The subcontract also must include the Notice containing the goals

for minority and female participation stated in the solicitation for the contract.

If the Contractor is participating in a Hometown Plan approved by the U.S. Department of Labor in a covered area, its affirmative action obligations on all work in the Plan area are to comply with the Plan for those trades that have unions participating in the Plan. Contractors must be able to demonstrate participation in, and compliance with, the provisions of the Plan. Contractors are also required to comply with obligations under the “Equal Opportunity” clause. The contractor is also responsible for implementing the affirmative action procedures listed in FAR 52.222-27 subparagraphs (g)(1) through (g)(16).

C. Small Business

By virtue of their size, all performance-based management contracts (PBMCs) within DOE are required to contain the clauses at:

- FAR 52.219-9, “Small Business Subcontracting Plan,”
- FAR 52.219-8, “Utilization of Small Business Concern,” and
- FAR 52.219-16, “Liquidated Damages – Subcontracting Plan.”

As set forth at FAR 19.705-5(a)(5), acceptable Subcontracting Plans are required to be incorporated into and made a material part of the contract.

What must each Subcontracting Plan include?

In accordance with FAR 19.704, each Subcontracting Plan must include the following:

- Separate percentage goals for using small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors;
- A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;
- A description of the principal types of supplies and services to be subcontracted and an identification of types planned for subcontracting to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;
- Description of the method used to develop the subcontracting goals;
- A description of the method used to identify potential sources for solicitation purposes;
- A statement as to whether or not the contractor included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of

indirect costs to be incurred with small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

- Name of the employee who will administer the subcontracting program and a description of the duties of the individual;
- A description of the efforts the contractor will make to ensure that small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts;
- Assurances that the contractor will include the clause at FAR 52.219-8, "Utilization of Small Business Concerns," in all subcontracts that offer further subcontracting opportunities and that the contractor will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$500,000 (\$1,000,000 for construction) to adopt a plan that complies with the requirements of the clause at FAR 52.219-9.
- A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the contractor's efforts to locate small business, HUBZone small business, small disadvantaged business concerns and to award subcontracts to them.

- Assurances that the contractor will cooperate in any required studies or surveys, submit periodic reports, submit SF 294 and SF 295 in accordance with instructions on the forms, and ensure that its subcontractors agree to submit SF 294 and SF 295.

DOE's Subcontracting Reporting System, which tracks the small business results for DOE's contractors from data contained on Standard Forms 294 and 295, has been redesigned and is available for tracking and recording subcontracting data. This new system eliminates the shipment of diskettes and paper between contractors and Heads of Contracting Activities (HCAs) and DOE Headquarters. Contractors enter the forms via a World Wide Web browser, and the data will flow from the contractor to the HCA and from the HCA to Headquarters via the Internet. The "U.S. Department of Energy Office of Procurement and Assistance Management Office of Management Systems Subcontracting Reporting System Handbook" is electronically available at the following web site address and as listed in Appendix B:

<http://www.pr.doe.gov/pr3.html>

When can a "Subcontracting" incentive be included in the contract?

In accordance with FAR 19.708(c)(1), a clause substantially the same as the incentive subcontracting clause at FAR 52.219-10 may be used when additional and unique contract efforts could significantly increase subcontracting awards to small business, HUBZone small business, or women-owned

small business concerns (see also FAR 19.705-4(c)).

However, as set forth at FAR 19.708(c)(3), the clause at FAR 52.219-10 is not to be used when small business, HUBZone small business and women-owned small business subcontracting is one of the factors to be considered in determining the award fee in a cost-plus-award-fee contract.

Additionally, in accordance with FAR 19.1204(c), the contracting officer may include a clause substantially the same as FAR 52.219-26, “Small Disadvantaged Business Participation Program-Incentive Subcontracting.” The contracting officer may include an award fee provision in lieu of the incentive; in such cases, however, the contracting officer shall not use the clause at 52.219-26.

In accordance with FAR 19.705-1, when using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the Subcontracting Plan, the CO must ensure that the goals are realistic. The CO must also ensure any rewards for exceeding goals are commensurate with the efforts the contractor would not have otherwise expended. The ability to satisfy these conditions may be challenging. Incentive provisions should be negotiated, if at all, only after reaching agreement on the Subcontracting Plan.

Various approaches may be used in the development of such incentives. They can take many forms, from a fully quantified schedule of payments based on actual subcontract achievement to an award-fee approach employing subjective evaluation

criteria. However, historically DOE has not used objective incentives under its PBMCs but rather has evaluated such socioeconomic areas subjectively under award fee and similar arrangements.

Who reviews the Subcontracting Plan?

In accordance with FAR 19.705-4, the CO reviews the Subcontracting Plan for adequacy, and ensures that the required information, goals, and assurances are included.

No detailed standards apply to every Subcontracting Plan. Each Plan must be considered in terms of the circumstances of the particular acquisition including:

- The previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions,
- Proven methods of involving small business concerns as subcontractors in similar acquisitions, and
- The relative success of methods the contractor intends to use to meet the goals and requirements of the Plan, as evidenced by records maintained by contractors.

The acceptability of the Plan shall be based on the negotiation of each of the required elements of the Plan (see FAR 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the contractor expending good faith efforts to use small business, HUBZone small business, small disadvantaged

business, and women-owned small business subcontractors to the maximum practicable extent. Care should be taken to ensure that unreasonably low goals have not been submitted to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts.

Particular attention should be paid to the identification of steps, that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. In determining acceptability of a Plan, the contractor's past performance in awarding subcontracts for the same or similar products or services to small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns should be considered. Performance of other contractors on similar efforts may be considered.

The CO ensures that the goals offered are attainable in relation to:

- Subcontracting opportunities available,
- The pool of eligible subcontractors available to fulfill subcontracting opportunities, and
- The actual past performance of the contractor in fulfilling goals specified in prior Plans.

The contractor's make-or-buy policy or program should not conflict with the Subcontracting Plan. Also the

subcontracting potential should take into consideration the:

- Make-or-buy policies or programs;
- Nature of the supplies or services to be subcontracted;
- Known availability of small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in the geographical areas where the work will be performed; and
- Contractor's contractual relationship with its suppliers.

The CO can also advise the contractor of available sources of information as well as any specific concerns known to be potential subcontractors especially if proposed goals are questionable and more realistic and acceptable goals need to be developed.

In any solicitation requiring submission of a Subcontracting Plan, the CO shall provide the Small Business Administration resident procurement center representative a reasonable period of time to review the solicitation and to submit advisory findings.

For what is the CO responsible in awards involving Subcontracting Plans?

As set forth at FAR 19.705-5, the CO must:

- Consider the contractor's compliance with previous Subcontracting Plans in determining contractor responsibility;
- Assure that a Subcontracting Plan was submitted when required;

- Notify the SBA resident procurement center representative of the opportunity to review the proposed contract including the Plan and supporting documentation in sufficient time for submission of advisory recommendations back to the CO;
- Determine any fee that may be payable if an incentive is used in conjunction with the Subcontracting Plan; and
- Ensure that an acceptable Plan is incorporated into and made a material part of the contract.
- Monitoring, evaluating, documenting contractor performance under the Small Business Subcontracting Plan clause at FAR 52.219-9 and under the Subcontracting Plan in the contract; and
- Initiating action to assess liquidated damages upon receipt of reliable evidence to indicate that such action is warranted and taking action to enforce the terms of the contract if the contractor is failing to comply in good faith with the Subcontracting Plan.

Letter contracts shall contain a preliminary Plan addressing the requirements of FAR 19.704 and in such cases, the final Plan must be negotiated with 90 days after award or before definitization.

What are the CO's responsibilities following award of the contract?

The CO who approved the Plan is responsible for notifying the Small Business Administration of the award by sending a copy of the award document to the Area Director, Office of Government Contracting, in the Small Business Administration area office where the contract will be performed.

COs are also responsible for:

- Giving the assigned Small Business Administration resident procurement center representative, if any, a copy of the final negotiated Subcontracting Plan that was incorporated into the contract or contract modification;

What happens if the contractor fails to comply with a Subcontracting Plan?

As provided by FAR 19.705-7, when a contractor fails to make a good faith effort to comply with a Subcontracting Plan, liquidated damages are paid by the contractor. The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

If a contractor has failed to meet its subcontracting goals the CO reviews all available information for an indication that the contractor has not made a good faith effort to comply with the Plan. If no such indication is found the CO documents the file accordingly. If the CO decides that there was not a good faith effort, a written notice is given to the contractor specifying the failure and providing at least a 15 working day response time.

Notification requirements can be found in

FAR 19.705-7(c). If after consideration of all data, the CO finds that the contractor failed to make a good faith effort to comply with its Plan, a final decision is issued requiring the contractor to pay liquidated damages in a stated amount, subject to the Disputes clause.

What are Energy Policy Act requirements regarding subcontracting?

DEAR sections 952.226-70, 952.226-71, 952.226-72, 952.226-73, and 926.70 and section 3021(a) of the Energy Policy Act provide that the Department should award not less than 10 percent of the total combined amounts obligated for contracts and subcontracts in the performance of Energy Policy Act work to certain target groups. These target groups are small business concerns owned and controlled by socially and economically disadvantaged individuals or by women, historically black colleges and universities. Colleges and universities having a student body in which at least 20 percent of the students are Hispanic Americans or Native Americans (collectively referred to as “Energy Policy Act Target Groups”) are also target groups.

Acquisition Guide, Chapter 26, contains a list of DOE budget line items that are most likely to involve Energy Policy Act work. Solicitations for Energy Policy Act procurements are to contain the provisions at:

- DEAR 952.226-70, “Subcontracting Goals Under Section 3021(a) of the Energy Policy Act of 1992” and
- DEAR 952.226-73, “Energy Policy Act

Target Group Representation.”

Prime management contracts for Energy Policy Act requirements are required to contain the provisions at:

- DEAR 952.226-71, “Utilization of Energy Policy Act Target Entities,” and
- DEAR 952.226-72, “Energy Policy Act Subcontracting Goals and Reporting Requirements.”

In addition to their obligations under other provisions of their contracts, prime contractors subject to Energy Policy Act must provide their best efforts to competitively award subcontracts to entities from among the Energy Policy Act target groups.

Goals must be inserted into the clause at DEAR 952.226-72 for award of subcontracts to Energy Policy Act Target Groups. The contractor, in performance of the contract, agrees to provide its best efforts to award subcontracts as specified and to report on its progress against the goals as an addendum to the SF 294 and SF 295. Additionally, as per DEAR 970.2601, the attendant reporting requirements are included in the Subcontracting Plan for management and operating contracts and apply to the annual dollar obligations specifically provided to the management and operating contractor for competitively awarded subcontracts that fulfill Energy Policy Act requirements.

What is the DOE Mentor-Protege Program?

The DOE Mentor-Protege Program is

intended to encourage DOE prime contractors to assist certain small businesses and minority educational institutions in enhancing their capabilities to perform contracts and subcontracts for DOE and other Federal agencies. The small businesses and minority educational institutions covered by the program are:

- Small disadvantaged firms certified by the Small Business Administration under Section 8(a) of the Small Business Act (8(a)s),
- Other small disadvantaged businesses,
- Historically Black Colleges and Universities, and other minority institutions of higher learning,
- Women-owned small businesses, and
- Small business concerns owned and controlled by service disabled veterans

The program seeks to foster long term relationships between DOE prime contractors and these small business entities and minority institutions of higher learning and to increase the overall number of these small business entities and minority institutions that receive DOE contract and subcontract awards. The regulations providing for this program are at DEAR 919.70. There is a solicitation provision, at DEAR 952.219-70, to notify proposers of the existence of the program.

WHAT ARE MY MAJOR ROLES AND RESPONSIBILITIES IN THE AREA OF THE DIVERSITY PLAN, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS?

On the following pages are the major roles and responsibilities of members of the contract administration team. Key sections of documents have been summarized for ease of reference. Please bear in mind that the referenced documents themselves are controlling and should be consulted for a complete discussion of the various roles, responsibilities and requirements. Additionally, other documents, not listed here, may contain other roles and responsibilities.

Note: Various responsibilities on the following pages are marked with an asterisk (*). This signifies that the responsibility is not specifically assigned to this individual by a clause, regulation, or procedure. It is suggested because:

- (1) The responsibility is necessary to perform Government contract administration responsibilities; and is either commonly performed by this individual or reflects "good business practice."
- (2) The responsibility is stated in the reference as a DOE/Government responsibility; and is either commonly performed by this individual or reflects "good business practice."

Local guidance may determine who specifically is obligated to perform the responsibility.

AGENCY HEAD

May waive any or all terms of FAR 52.222-35 or 52.222-36 clauses with concurrence of the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor if in the national interest or essential to the national security.

[FAR 22.1303]

Ensure Equal Opportunity requirements are carried out.

Cooperate with and assist the Office of Federal Contract Compliance Programs.

[FAR 22.803]

HEAD OF THE CONTRACTING ACTIVITY

Delegate, on behalf of the Small Business Administration, authority to COs to award prime 8(a) contracts.

[Acquisition Letter 98-09]

Ensure that the Small Business policies and procedures are used to the maximum extent feasible. Ensure that contractor purchasing systems of contractors for the management and operation of major DOE sites and facilities include effective small business advocacy programs to support the Department's responsibility to award a fair proportion of DOE appropriated dollars to small businesses.

[Acquisition Letter 2000-02]

* Compliance with and performance against the Diversity Plan will be assessed as part of the contractor's annual performance report card.

[Acquisition Letter 98-04]

PROGRAM OR REQUIREMENTS PERSONNEL

Identify on the purchase request whether the procurement is an Energy Policy Act requirement.

[Acquisition Guide, Chapter 26]

CONTRACTING OFFICER

Ensure subcontracting goals are realistic and any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended.

[FAR 19.705-1]

Provide the Small Business Administration resident procurement center representative a reasonable period to review solicitations requiring submission of a Subcontracting Plan before the solicitation is issued.

[FAR 19.705-3]

Review the Subcontracting Plan for adequacy ensuring that the required information, goals, and assurances are included.

[FAR 19.705-4]

Ensure an acceptable Subcontracting Plan is incorporated into and made a material part of the contract.

[FAR 19.705-5]

* ACO (usually CO at DOE) assists in evaluating subcontract plans, and for monitoring, evaluating, and documenting contractor performance of Subcontracting Plans.

[FAR 19.706]

Give written notice to the Office of Federal Contract Compliance Program regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. When requested by the Office of Federal Contract Compliance, arrange a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

[FAR 22.804-2(c)]

* May cancel, terminate or suspend in whole or in part if the Office of Federal Contract Compliance Programs determines that the contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor under the procedures authorized in Executive Order 11246.

[FAR 52.222-26]

Not approve a contract, modification, or subcontract with a person found ineligible by the Department of Labor for reasons on noncompliance with EO 11246.

[FAR 22.802]

Request a pre-award clearance from the appropriate Office of Federal Contract Compliance Program regional office before award of any contract or modification.

Provide Equal Opportunity clearance in writing to prime on subcontracts \$10 million or more.

Furnish the contractor the "Equal Opportunity Is The Law" poster.

[FAR 22.805]

Take necessary action as soon as possible upon notification to implement any sanctions imposed on a contractor by the Department of Labor for violations of FAR 52.222-35 which may include withholding from payments otherwise due, termination or suspension of the contract, or debarment of the contractor.

[FAR 22.1307]

Determine if the contractor's exceeding its subcontracting goals was or was not due to the contractor's own efforts.

[FAR 52.219-10, FAR 52.219-26]

Decide if contractor failed to make good faith effort to comply with Subcontract Plan, provide written notice to contractor specifying the failure, and issue final decision for contractor to pay liquidated damages.

[FAR 52.219-16]

Provide a copy of the Diversity Plan to the Office of Small and Disadvantaged Business Utilization .

[Acquisition Letter 98-04]

Review, negotiate and approve the Contractor's Diversity and Subcontracting Plans.
[DEAR 970.5204-81, FAR 52.219-9]

Furnish to the contractor appropriate notices from the Office of Federal Contract Compliance Programs regional office that state the contractor's obligations and the rights of individuals with disabilities.
[FAR 22.1404, FAR 52.222-36]

Advise affected labor unions that the Department of Labor will give them appropriate opportunity to present their views if a revision of a collective bargaining agreement is necessary.
[FAR 22.1405, 22.1305]

Ensure small business plan requirements are appropriately flowed down and necessary reports are provided to the next higher tier, through the prime, to DOE, with the Small Business Specialist .
[FAR 52.219-9]

Meet periodically with directors of contractor purchasing to review the status of the contractor's performance against its Small Business Subcontracting Plan as implemented by the clause and FAR Subpart 19.7 to ensure the maximum practicable utilization of small businesses in Government contracts, including the contractor's attainment of negotiated subcontracting goals. Encourage contractors to adapt the tools in paragraphs B, E, and F of Section I of Acquisition Letter 2000-02 and to take advantage of the tools in Section II of the Acquisition Letter: Provide a copy of the contractor's "Make or Buy" plan to the DOE Small Business Program Manager.
Ensure that the contractor's purchasing system and methods provide for a special internal review of consolidated requirements where it is unlikely that small businesses will be able to compete.
[Acquisition Letter 2000-02]

Submit copies of procurement request packages over \$3M to DOE Office of Economic Impact and Diversity.
[Acquisition Letter 2000-02]

* Participate with contracting officer representative and DOE Mentor-Protege Program Manager in reviewing semi-annual progress reports from the Mentor contractor.
[DEAR 919-7013(a)]

* Include results of the review of the semi-annual Mentor-Protege progress reports from the Mentor Contractor in the award fee evaluations of the affected contractor.
[DEAR 919-7013(b)]

CONTRACTOR

Develop a written affirmative action program for each establishment within 120 days from its first Government non-construction contract, subcontract or Government bill of lading.

[FAR 22.804-1]

Submit progress reports to the DOE Mentor-Protege Program Manager semi-annually.

[DEAR 919-7013(c)]

Establish procedures to ensure timely payment of amounts due subcontracts with small business concerns.

Ensure maximum practicable opportunity of small businesses to participate in performing Federal contracts.

Award subcontracts to the fullest extent consistent with efficient contract performance.

[FAR 52.219-8]

Attempt to meet or exceed the specified subcontracting goal.

[FAR 52.219-10, FAR 52.219-26]

Agrees that it does not and will not:

- Maintain or provide for its employees any segregated facilities, and
- Permit its employees to perform their services at any location under its control where segregated facilities are maintained; and

Include the clause in subcontracts subject to the “Equal Opportunity” clause.

[FAR 52.222-21]

Agrees to:

- Not discriminate against any employee or applicant for employment;
- Take affirmative action to ensure that applicants are employed and treated during employment without regard to their race, color religion, sex, or national origin;
- Post notices provided by the CO in conspicuous places available to employees and applicants;
- State in all solicitations or advertisements for employees that all qualified applicants will receive consideration for employment without regard to race color, religion, sex, or national origin;
- Advise labor union or workers’ representative of Contractor commitments under this clause;
- Comply with EO 11246;
- Permit access to its premises, during normal business hours by the contracting agency or the Office of Federal Contract Compliance Programs; and
- Flow the clause to subcontract or purchase orders not exempted by the Secretary of Labor.

[FAR 52.222-26]

Flows the clause, and the Notice containing the goals for minority and female participation, to subcontractors at any tier for work involving any construction trade.

Take affirmative action to ensure equal employment opportunity based on procedures listed in FAR 52.222-27(g)(1) through (g)(16).

Designate a responsible official to monitor, submit reports, keep records.

[FAR 52.222-27]

Notify the Department of State when it has knowledge of any employee or potential employee being denied an entry visa to a country in which the contractor is required to perform the contract, and it believes the denial is attributable to race, color religion, sex, or national origin.

[FAR 52.222-29]

Comply with rules, regulations, and relevant orders of the Secretary of Labor issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1972.

List all employment openings existing at contract award or occurring during contract performance, at an appropriate office of the State employment service system in the locality where the opening occurs.

[FAR 52.222-35]

Post employment notices stating the Contractor's obligation to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era, and the rights of applicants and employees.

Include the terms of this clause in every subcontract or purchase order of \$10,000 or more unless exempted.

[FAR 52.222-35]

Report annually in the first quarter of the calendar year on the:

- Number of disabled and the number of veterans from the Vietnam era in its workforce and
- The total number of new employees hired during the period covered by the report, and of that total, the number of disabled veterans, and the number of veterans of the Vietnam era.

Include the terms of the clause in every subcontract or purchase order of \$10,000 or more unless exempted.

[FAR 52.222-37]

Submit and negotiate, upon request by the Contracting Officer, a subcontracting plan, where applicable, that separately addresses subcontracting with small business, HUBZone small business concerns, small disadvantaged business, and women-owned small business concerns.

[FAR 52.219-9]

Submit goals or reports for measurement for subcontracting achievements to the CO.

[FAR 52.219-9, DEAR 926-7006, DEAR 952.226-70, DEAR 952.226-72]

Use best efforts to competitively award subcontracts to entities from the target groups under the Energy Policy Act of 1992.

[DEAR 952.226-71]

Submit as part of Subcontracting Plan goals for Energy Policy Act target groups.

[DEAR 952.226-70]

Submit a Diversity Plan after 90 days after contract award.

Submit an annual Diversity Plan update along with the annual fee proposal

[DEAR 970.5204-81]

Not discriminate against any employee or applicant because of physical or mental disability.

Agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified individuals with disabilities without discrimination based upon their physical or mental disability in all employment practices.

Agrees to post employment notices.

[FAR 52.222-36]

Notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Contractor is bound by the terms of Section 503 of the Act and is committed to take affirmative action to employ, and advance in employment, qualified individuals with physical or mental disabilities.

Flow this affirmative action clause down to subcontractors.

[FAR 52.222-36]

Flow Subcontract Plan requirements to subcontractors and each qualifying lower tier subcontractor over \$500K.

[FAR 52.219-9]

Demonstrate good faith efforts to meet Subcontracting Plan goals and discuss with CO.

Pay the Government liquidated damages in an amount stated if the contracting officer decides that the contractor did not demonstrate good faith efforts to meet the Subcontracting Plan.

[FAR 52.219-16]

Include listed clauses in subcontracts.

[DEAR 970.5204-44]

Include within the Diversity Plan the information which is delineated in the Acquisition Letter.

[Acquisition Letter 98-04]

Not enter into subcontracts of \$10 million or more without preaward equal opportunity clearance.

[FAR 52.222-24]

Obtain representations of small disadvantaged status from joint venture partners and teaming arrangement members through use of a provision substantially the same as paragraph (b)(1)(I) of the provision at FAR 52.219-22, "Small Disadvantaged Business Status."

[FAR 52.219-25]

Confirm that a joint venture partner, team member, or subcontractor representing itself as a small disadvantaged business concern, is identified as a certified small disadvantaged business in the database maintained by the Small Business Administration (PRO-Net) or by contacting the SBA's Office of Small Disadvantaged Business Certification and Eligibility.

Report on the participation of Small Disadvantaged Business concerns at contract completion, or as otherwise provided in this contract if the contract contains Small Disadvantaged Business participation targets.

[FAR 52.219-25]

Authorized to award subcontracts with a value of \$5 million or less for manufacturing standard industrial classifications and \$3 million or less for all other acquisitions on a noncompetitive basis to firms certified as participants by the Small Business Administration under its 8(a) program. Contractors may also set-aside for competition among 8(a) firms requirements in excess of those thresholds.

Authorized to set aside general construction requirements valued at \$3 million or less for small business on a class basis.

Authorized to use HUBZone set aside and HUBZone sole source procurement techniques in the award of subcontracts under conditions similar to those applicable to the award of Federal prime contracts.

Authorized to provide for an evaluation criterion that reflects a preference in the award of subcontracts to firms that propose to make significant use of small disadvantaged business or small woman-owned business in the performance of the proposed subcontract.

Authorized to set aside purchases valued up to \$100,000 for award to small businesses and to make purchases valued up to \$50,000 on a sole source basis to small businesses.

May enter into Mentor-Protege agreement with small businesses, small disadvantaged businesses, including 8(a) concerns, and woman-owned businesses to enhance the commercial viability of such businesses.

[Acquisition Letter 2000-02]

CONTRACTING OFFICER REPRESENTATIVE

* Receive, review, retain for monitoring purposes the contractor and subcontract annual plans for EEO, Affirmative Action, Diversity, and Small business goals to encourage the awardees to be compliant, and initiate action when non-compliance occurs.

* Ensure that contractor non-compliance issues in performance areas of Equal Employment Opportunity, Affirmative Action, Diversity, and maximization of Small Business opportunities

are considered relative to funds paid to the prime.

* Participate with contracting officer and the DOE Mentor-Protege Program Manager in reviewing semi-annual progress reports from the Mentor contractor.

[DEAR 919-70(a)]

WHERE CAN I GO FOR MORE DETAILED INFORMATION ON DIVERSITY, EQUAL EMPLOYMENT OPPORTUNITY, AND SMALL BUSINESS?

On Diversity

1. DEAR 970.5204-81, "Diversity Plan"
2. Acquisition Letter 98-04, "Diversity Plan"
3. Federal Register, 62 FR 44350, August 20, 1997

On Equal Opportunity and Affirmative Action

4. FAR 22.8, "Equal Employment Opportunity"
5. FAR 22.9, "Nondiscrimination Because of Age"
6. FAR 22.13, "Disabled Veterans and Veterans of the Vietnam Era"
7. FAR 22.14, "Employment of Workers with Disabilities"
8. FAR 52.222-21, "Prohibition of Segregated Facilities"
9. FAR 52.222-22, "Previous Contracts and Compliance Reports"
10. FAR 52.222-23, "Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction"
11. FAR 52.222-25, "Affirmative Action Compliance"
12. FAR 52.222-24, "Preaward On-Site Equal Opportunity Compliance Evaluation"
13. FAR 52.222-26, "Equal Opportunity"
14. FAR 52.222-27, "Affirmative Action Compliance Requirements for Construction"
15. FAR 52.222-29, "Notification of Visa Denial"
16. FAR 52.222-35, "Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era"
17. FAR 52.222-36, "Affirmative Action for Workers with Disabilities"
18. FAR 52.222-37, "Employment Reports on Disabled Veterans and Veterans of the Vietnam Era"
19. DEAR 919.70, "Mentor-Protege Program"
20. DEAR 922.8, "Equal Employment Opportunity"

**On Small, Small Disadvantaged, HUBZone,
and Women-Owned Business**

21. DEAR 926.70, “Implementation of Section 3021 of the Energy Policy Act of 1992”
22. DEAR 952.219-70, “DOE Mentor-Protege Program”
23. DEAR 952.226-70, “Subcontracting Goals under Section 3021 (A) of the Energy Policy Act of 1992”
24. DEAR 952.226.71, “Utilization of Energy Policy Act Target Entities”
25. DEAR 952.226-72, “Energy Policy Act Subcontracting Goals and Reporting Requirements”
26. DEAR 952.226-73, “Energy Policy Act Target Group Representation”
27. DEAR 970.19, “Small, Small Disadvantaged and Women-Owned Small Business Concerns”
28. DEAR 970.2601, “Implementation of section 3021 of the Energy Policy Act of 1992”
29. DEAR 970.5204-44, “Flow Down of Contract Requirements to Subcontracts”
30. Acquisition Guide, Chapter 26, “Energy Policy Act Implementation”
31. Acquisition Letter 2000-02, “Small Business Programs”
32. Acquisition Letter 98-09, “8(a) Memorandum of Understanding”
33. FAR 52.219-8, “Utilization of Small Business Concerns”
34. FAR 52.219-9, “Small Business Subcontracting Plan”
35. FAR 52-219-10, “Incentive Subcontracting Program”
36. FAR 52.219-16, “Liquidated Damages-Subcontracting Program”
37. FAR 52.219-25, “Small Disadvantaged Business participation Program-Disadvantaged Status and Reporting”
38. FAR 52.219-26, “Small Disadvantaged Business Participation Program-Incentive Subcontracting”

**DO YOU HAVE ANY COMMENTS OR SUGGESTIONS FOR
IMPROVING THIS CHAPTER OR THE BOOK? IF SO, PLEASE
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